CORPORATION COURT OF NEWPORT NEWS, VA.

COMMONWEALTH, ETC. *v.* BARRETT.

Public Officers—Qualifications—District School Trustee.—A public officer who acts for the state at large comes within the definition of "state officer," as used in § 1538 of the Virginia Code of 1904.

Same—Same—Same.—A member of the House of Delegates is a state officer within the meaning of § 1538 of the Virginia Code of 1904, which provides that: "No federal or state officer, no member of common council or any officer thereof, during his term of office, or for one year thereafter, or city treasurer, shall be chosen or be allowed to act as district school trustee."

Same—Same—Same.—The words "shall not be allowed to act," as used in § 1538 of the Virginia Code of 1904, which provides that: "No federal or state officer, no member of common council or any officer thereof, during his term of office, or for one year thereafter, or city treasurer, shall be chosen or be allowed to act as district school trustee," render the office of district school trustee incompatible with that of a state office, and the acceptance of such office by a district school trustee, vacates the office of school trustee.

Same—Same—Same.—The enumeration by § 44 of the Constitution of Virginia of certain offices, which shall be vacated upon the acceptance of the office of legislator, does not prohibit the legislature from prescribing that the office of district school trustee shall be vacated upon the acceptance of such office. Accordingly, this clause of the Constitution does not avoid that portion of § 1538 of the Virginia Code of 1904, which provides that: "No federal or state officer, no member of common council or any officer thereof, during his term of office, or for one year thereafter, or city treasurer, shall be chosen or be allowed to act as district school trustee."

Same—Same.—Where the Constitution has prescribed the qualifications of an officer, the legislature can neither add to nor subtract from them.

Constitutions—Construction.—The maxim "Expressio unius est exclusio alterius" does not apply in the construction of Constitutions.

Statutes—Interpretation and Construction.—It is a rule of construction, that when a statute is plain, there is no room for construction.

Quo warranto.

Ashby & Read, for relator.
John W. Friend, for respondent.

Opinion by special JUDGE LOUIS C. PHILLIPS.

This is an information in the nature of a writ of quo war-

ranto to determine the title of the respondent to the office of district school trustee of the city of Newport News, Virginia.

The petition states that the respondent was elected as a district school trustee for the second district of said city for a term of three years beginning August 1st, 1905; that he duly qualified, entered upon the performance of the duties of the office and is now performing the same; that at the general election held in November, 1907, the respondent was elected as the representative of the city of Newport News, Virginia, in the House of Delegates of Virginia, and duly qualified as such. The respondent filed an answer admitting these allegations to be true.

Section 1538, Virginia Code, 1904, among other things, provides:

"No federal or State officer, no member of common council or any officer thereof, during his term of office, or for one year thereafter, or city treasurer, shall be chosen or be allowed to act as district school trustee."

The contention of the relator is that the respondent is a state officer and that when he accepted the office of delegate to the General Assembly he thereby gave up, vacated and forfeited the said office of district school trustee.

The determination of this question involves the consideration of three points—two upon the construction of the statute quoted above, the other upon the construction of section 44 of the constitution:

1. Is a member of the House of Delegates a State officer within the meaning of the Statute? I think he is.

"The mere fact that senators are elected by only a portion of the voters of the state, that they are elected in districts, does not, it is conceived, prevent them from being considered state officers. If the constitution permitted the districting of the state for the election of supreme judges, one to be elected in each division, they would still be 'state officers' of the judicial department. County commissioners are elected by districts. Yet they are county officers. This was decided by the supreme court of this state, when, under the then existing law, only one county in the state (Leavenworth) was districted, and the number of commissioners in that county increased by giving one to each township and to each ward in the city of Leavenworth." State of Kansas *v.* Pomeroy, 1st Central Law Journal, page 415.

"A public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer. This, we consider to be the true definition of a public officer in its original broad sense. The essense of it is, the duty of performing an agency, that is, of doing some act or acts, or series

of acts for the State." State *v.* Stanley (N. C.), 8 Amer. Rep. page 489.

To the same effect, see Hill *v.* Boyland, 40 Miss. 619; Morris *v.* Haines, 2 N. H. 246; 33 Am. & Eng. Enc. of Law, 322.

Most of the cases cited above speak of a legislator as a public officer, but it seems conclusive to me that a "public" officer who acts for the state at large comes within the definition of "state officer."

The respondent urged that even though legislators be held state officers, they should be excepted from the operation of the statute, but with this contention I cannot agree. The Statute is plain, and when that is the case, there is no room for construction.

"It is the duty of the court to ascertain the intention of the Legislature, and, when ascertained, to give it effect; and in the search for that intent it is its duty to consider the object of the statute and the purpose to be accomplished. It must reach the intent, however, by giving to the words used their ordinary and usual signification, and to every word and every part of the statute, if possible, its due effect and meaning. * * * The intent of the Legislature, therefore, is always to be sought for by giving a fair construction to the language used, attributing to the words their ordinary and popular meaning, unless it plainly appears that they were used in some other sense." Funkhouser *v.* Spahr, 102 Va. 313.

"When a law is plain and unambiguous, whether expressed in general or limited terms, the legislature shall be presumed to mean what they have plainly expressed, and no room is left for construction." Johnson *v.* Mann, 77 Va. 265.

2. What is the meaning of the language "shall not be allowed to act." The language is peculiar, and I have not been able to find anything like its counterpart in any adjudicated case. In a portion of the statute preceding that quoted, it is provided that when a district school trustee shall cease to be a resident of the district for which appointed "his office shall be deemed vacant." It might be urged that had the legislature intended the office of school trustee to be vacated upon the acceptance of any of the offices mentioned in the clause of the statute quoted, it would have used the same phraseology; and that consequently a different meaning was intended because of the difference in phraseology.

With this reasoning I cannot agree—an anomalous condition would be created were a district school trustee permitted to retain the title to the office while not allowed to act. The legislature cannot be presumed to have intended any such absurd result.

I believe the phraseology used renders the office of district school trustee *incompatible* with that of a state office and that

consequently the acceptance of a state office by a district school trustee, vacates the office of school trustee. This it seems to me is the only reasonable construction of the language used.

"The acceptance of an incompatible office actually vacates any other office which the officer may hold. The rule has been stated in broad and unqualified terms that the acceptance of an incompatible office by whomsoever the appointment or election might be made, absolutely determined the original office, leaving no shadow of title in the possessor, whose successor may be at once elected or appointed, neither *quo warranto* nor amotion being necessary." Shell *v.* Cousins, 77 Va. 331. See also, Bunting *v.* Willis, 27 Grat. 144, 159; 23 Am. & Eng. Ency. of Law. 333.

3. The respondent contends, however, that even though the foregoing conclusions be correct, yet section 44 of the constitution overrides the section of the code referred to and renders it unconstitutional. This section of the Constitution is as follows:

Sec. 44. Any person may be elected senator who, at the time of election, is actually a resident of the senatorial district, and qualified to vote for members of the General Assembly; and any person may be elected a member of the House of Delegates who, at the time of election, is actually a resident of the the house district and qualified to vote for members of the General Assembly. But no person holding a salaried office under the state government, and no judge of any court, attorney for the Commonwealth, sheriff, sergeant, treasurer, assessor of taxes, commissioner of the revenue, collector of taxes, or clerk of any court, shall be a member of either house of the General Assembly during his continuance in office, and the election of any such person to either house of the General Assembly, and his qualification as a member thereof, shall vacate any such office held by him; and no person holding any office or post of profit or emolument under the United States Government or who is in the employment of such government, shall be eligible to either house. The removal of a senator or delegate from the district for which he is elected, shall vacate his office.

It is urged that the terms of the first clause of this section permit the election of a school trustee, to the general assembly; that this conclusion is strengthened by the provision in the second part of the section that certain officers enumerated, while they may be elected to the general assembly, vacate such offices when they qualify as members of the Assembly, and that inasmuch as school trustees are not among the officers who vacate their offices upon their election, they are allowed to retain them.

This view was presented with much force; it is a question of great difficulty, and though I have searched diligently, I have been unable to find any case bearing upon any similar constitutional

section. I believe the law to be well settled that where the constitution has prescribed the qualifications of an officer, the legislature can neither add to nor subtract from them, but it must be remembered that the question for consideration upon this point is as to the qualifications of *district school trustees* and *not* of members of the legislature.

Stated succinctly, the question as it appears to me is: Does the enumeration by the constitution of certain offices, which shall be vacated upon the acceptance of the office of legislator impliedly prohibit the legislature from prescribing that the office of district school trustee shall be vacated upon the acceptance of such office?

The first clause of the section of the constitution under consideration has reference, it seems to me, only to such matters as residence, and the other requisities which are included within the qualifications of a vote, these being sufficient to qualify a person for election to the legislature. If the first clause of this section stood alone, it seems to me beyond question that it would be within the power of the legislature to provide that certain officers upon their qualification as members of the legislature, should vacate their offices. And while the addition to the second clause makes the question much more difficult, I am of opinion that it does not bring about the result contended for by the respondent's counsel.

An important rule of construction upon this point is that maxim "*Expressio unis est exclusio alterius,*" does not apply in the construction of construction of constitutions.

"The Constitution (art. 3, sec. 20) provides: 'All offices created by this constitution shall become vacant by the death of the incumbent, by removal from the State, resignation, conviction of a felony, impeachment or becoming of unsound mind.' It is contended that the expression of these events as creating vacancies is the exclusion of all others, and there are a few decisions in other states lending color to the argument. It would be a sufficient answer to this contention to say that this court has always carried in view the principle that the state Constitution is not to be considered as a grant of power, but that its provisions are purely restrictive, and that legislation is valid unless prohibited by the State or Federal Constitution. Therefore, in such cases as the present, the maxim *Expressio unius est exclusio alterius* is not applicable, and the legislature may adopt any provision not prohibited by the Constitution."

See also, State *v.* Dodge Co. (Neb.) 30 Am. Rep. 319, reviewing a large number of cases from various states.

Giving full force to this rule of construction, it seems to me that the Constitution does not avoid that portion of section 1538 of the Code under consideration, and certainly it can be said

that the construction of section 44 of the constitution is sufficiently doubtful to resolve the doubt in favor of the constitutionality of the statute.' In a doubtful case it is the province of the Court to resolve all doubts in favor of the constitutionality of the statute.'

"We can declare an act of the General Assembly void only when such act clearly and plainly violates the constitution, and in such manner as to leave no doubt or hesitation on our minds." Commonwealth *v.* Moore & Goodsons, 25 Grat. 951, 953, cited in Button *v.* State Corp. Com., 105 Va. 637. It follows from the views above expressed that there must be judgment of ouster against the respondent.

IN THE CIRCUIT COURT OF FRANKLIN COUNTY, JUNE TERM, 1908.

BROOKS *v.* BROOKS' Heirs.

Dower—Barring or Defeating Dower—Case at Bar.—Held, that a clause in a will "I give to Gillie my Bureau if Gillie wishes & provided she the longest liver, you all can help her while remain my widow, nothing binding upon either party," will not bar the widow of her dower in the real estate of her husband, under §§ 2270, 2271, of Code, where widow has not renounced the will in the time prescribed.

Same—Same—By Antenuptial Agreements.—Held, that the alleged antenuptial contract, set up as a defence in this case, will not upon its face, and the evidence produced, bar the widow of her dower in her husband's real estate.

Bill in chancery brought in the Circuit Court of Franklin County (Judge Geo. J. Hundley presiding for Judge E. J. Harvey, by appointment of the Governor), by Gillie A. Brooks against the heirs of her late husband, W. D. Brooks, dec'd, to recover dower in the real estate of which W. D. Brooks died seized and possessed.

The bill in substance sets out that W. D. Brooks, the late husband of the plaintiff departed this life on the day of 1906, leaving a last will and testament, by which he devised his three tracks of land to his three children, respectively, (a copy of the will being exhibited) that the plaintiff had not been assigned dower in said lands, but was entitled to have same assigned her, giving names of proper defendants to the bill, and praying that Commissioners might be appointed to assign her dower, etc.

The defendants filed their answer, setting up the will, and